

EXHIBIT 1

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 William M. Fischbach III (*admitted pro hac vice*)
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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

TESLA, INC., a Delaware corporation,

Plaintiff,

vs.

MARTIN TRIPP, an individual,

Defendant.

MARTIN TRIPP, an individual,

Counterclaimant,

TESLA, INC., a Delaware corporation,

Counterdefendant.

Case No. 3:18-cv-00296-LRH-CBC

**DEFENDANT/COUNTERCLAIMANT
 MARTIN TRIPP’S PROPOSED
 SURREPLY TO TESLA, INC.’S REPLY
 IN SUPPORT OF ITS MOTION FOR
 SUMMARY JUDGMENT [ECF NO. 193]**

“Where new evidence is presented in a reply to a motion for summary judgment, the district court should not consider the new evidence without giving the [non-]movant an opportunity to respond.” *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996) (*quoting Black v. TIC Inv. Corp.*, 900 F.2d 112, 116 (7th Cir. 1990)) (brackets in original). Accordingly, Tripp responds to Tesla’s “additional exhibits” as follows:

1 • Citing to a June 15, 2018 e-mail from Tripp to Lopez, Lifrak Dec. Ex. 71 [ECF
 2 No. 194-2], Tesla argues that Tripp’s claim that he wanted to remain anonymous is
 3 “disingenuous” because he told Lopez in this e-mail that she could “freely use [his] name as
 4 source after the 29th [of June 2018].” *Id.*; Tesla Reply [ECF No. 193] at 4. Tesla overlooks
 5 the timing of this email. By June 14, 2018, Tesla had identified Tripp as the “leaker” and
 6 commenced its two-day interrogation of Tripp. Lifrak Dec. Ex. 6 [ECF No. 158-6]. By the
 7 time Tripp sent the June 15, 2018 email to Lopez, his anonymity had been compromised, not
 8 through his own conduct, but through Tesla’s investigation. Tesla’s “additional exhibits” are
 9 devoid of evidence that Lopez identified Tripp as her source *before* Tesla filed suit on June
 10 20, 2018. [ECF No. 1]. The fact remains that Tesla first put Tripp into the public view with
 11 its high-profile lawsuit, and only then did Tripp communicate with the press without the cloak
 12 of anonymity. *See* Tesla Reply [ECF No. 193] at 10-11. By that time, whatever interactions
 13 Tripp had with the press regarding Tesla’s lawsuit did not make him a limited purpose public
 14 figure. *Hutchinson v. Proxmire*, 443 U.S. 111, 134 (1979) (holding that the plaintiff, a
 15 research director and professor who had received federal funding for his studies, did not
 16 become a limited purpose public figure by responding to press inquiries after a U.S. Senator
 17 had bestowed a “Golden Fleece of the Month Award” on the plaintiff as an example of
 18 wasteful government spending).

19 • Citing to the deposition of Nicholas Gicinto, Tesla Senior Manager of Global
 20 Security, Tesla argues that “although Tripp was not armed at the time he was approached by
 21 police, Tesla determined in the course of its investigation that Tripp owned firearms.” Tesla
 22 Reply [ECF No. 193] at 18 n.10; Lifrak Dec. Ex. 72 [ECF No. 194-2]. Tesla is overselling
 23 this portion of Gicinto’s deposition. Gicinto testified that Tesla had determined that at some
 24 point Tripp had attempted to sell a firearm to a coworker for \$50, a price so low that it
 25 appeared Tripp was “just trying to offload it.” Deposition of Nicholas Gicinto, attached as
 26 **Exhibit J**, at 86:16-22. This information was of so little consequence to Tesla that its
 27 investigators never asked Tripp about his access to firearms during his June 14, 2018
 28 interrogation. *Id.* at 86:23-87:1. Gicinto also disavowed that this had any corroborative value

1 for the anonymous call. When asked whether “the mere fact of owning a firearm is an
 2 indicator that [someone] might be a violent person?”, Gicinto responded, “I’ve never said that
 3 and that’s not what I am saying.” *Id.* at 88:13-17. Finally, whether Tripp did or did not once
 4 own a firearm was never communicated to Elon Musk before Musk unleashed the false active
 5 shooter threat narrative to the press on June 20, 2018. *See* Tesla’s Amended Responses to
 6 Tripp’s Second Set of Interrogatories at ROG, Interrogatory # 12, attached as **Exhibit K**.

7 • Citing to Tripp’s June 14, 2018 interrogation, Tesla argues that Tripp was not
 8 “‘dragged’ unwilling into this controversy” because he knew “full well that Tesla would
 9 investigate the leak.” Tesla Reply [ECF No. 193] a 4; Lifrak Dec. Ex 73 [ECF No. 194-3].
 10 The quoted portions of Tripp’s June 14, 2018 interrogation say no such thing and are instead
 11 a resigned statement from Tripp that he “[knew] there’s consequences” and “expected them
 12 to come.” *Id.*¹ More importantly, Tesla fails to reconcile its argument here with the holding
 13 in *Wolston v. Reader’s Digest Association, Inc.* that a “private individual is not automatically
 14 transformed into a public figure just by becoming involved in or associated with a matter that
 15 attracts public attention.” 443 U.S. 157, 167-68 (1979).

16 • Citing to Elon Musk’s deposition, Tesla argues that Musk’s July 5, 2018 Tweet
 17 posed an “open ended question” rather than a statement that Tripp had been compensated by
 18 Lopez. Tesla Reply [ECF No 193] at 20; Lifrak Dec. Ex. 76 [ECF No. 194-7]. The portions
 19 of Musk’s deposition cited by Tesla are not helpful to its argument. Musk states in the cited
 20 portions of his testimony that Lopez could have easily denied the implicit charge of bribery.
 21 *Id.* at 83:21-22. This merely underscores that Musk intended his Tweet to be an accusation
 22 to be accepted as true unless Lopez (or Tripp) affirmatively denied it. In any event, Tesla
 23 cannot deny that when asked at his deposition—point blank—what “message [Musk] wanted
 24 to send” with the July 5 Tweet, Musk responded, “[O]ne of the members of Tesla security,
 25

26 ¹ In this same interview, Tripp professed, “I love working here” but “just wanted to get the
 27 facts out.” Lifrak Dec. Ex 73 [ECF No. 194-3] at 154:20-25. This is in stark contrast to
 28 Tesla’s characterization of Tripp as a vengeful employee determined to harm Tesla.

1 had told me that there was some guy who was a friend of Tripp’s who said that Linette Lopez
 2 had offered him \$50,000 for, you know, basically insider information on Tesla and implied
 3 that Tripp had received similar payment.” Tripp SOF ¶ 62. That Musk attempted to unwind
 4 this concession later in his deposition changes nothing.

5 • Citing to the depositions of Dave Arnold and Sarah O’Brien from Tesla’s
 6 communications team, Tesla argues that “the call warning of a threat against the Gigafactory
 7 was true—it happened,” and “[t]he fact that the Sheriffs did not find that Tripp was an active
 8 threat at that moment does not change the fact that the call, as reported, actually happened,
 9 nor does it mean that the caller was wrong about Tripp’s intentions.” Tesla Reply [ECF No
 10 193] at 18; Lifrak Dec. Exs. 74, 75 [ECF No. 194-5, 194-6]. The problem with this argument
 11 is that *there was no threat*. Neither Arnold nor O’Brien took or listened to the call, which
 12 was unrecorded. Tripp SOF ¶ 30. According to Shamara Bell, the call center operator that
 13 took the anonymous call, the caller never stated that Tripp “was going to come back and shoot
 14 people” or that he “would be coming to the Gigafactory to shoot the place up.” *Id.* at ¶ 31.
 15 The “threat” was a fiction authored to the press by Tesla.

16 • Citing to the deposition of its former Gigafactory security manager Sean
 17 Gouthro, Tesla argues that Gouthro’s “own testimony contradicts that he knew where Tripp
 18 was or where the threat was directed.” Tesla Reply [ECF No. 193] at 17; Lifrak Dec. Ex. 76
 19 [ECF No. 194-8]. The cited portions of Gouthro’s deposition reference the early stages of
 20 Tesla’s reaction to the active shooter threat—which was ultimately proven a hoax. In this
 21 portion of his deposition, Gouthro was discussing his early concern that the “threat” never
 22 even identified any particular Tesla facility, be it the Gigafactory in Sparks, NV, Tesla’s main
 23 production facility in Fremont, CA, or Tesla’s call center in Las Vegas, NV. *Id.* Again, this
 24 is because the anonymous caller *never* said that Tripp was on his way to the Gigafactory or
 25 any other Tesla location. Tripp SOF ¶¶ 28, 31. Even Gouthro appears to have appreciated
 26 that at the time. In the later portions of his deposition testimony, Gouthro is quite clear that
 27 Tesla’s private investigators were feeding him precise information on Tripp’s whereabouts in
 28 Reno on June 20, 2018. *See* Deposition of Sean Gouthro [ECF No. 177-4] at 106:7-108:7.

1 DATED this __ day of __, 2020.

2 TIFFANY & BOSCO, P.A.

3 By /s/William M. Fischbach III

4 Robert D. Mitchell

5 William M. Fischbach III

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7 2525 East Camelback Road

8 Phoenix, Arizona 85016-4229

9 *Counsel for Defendant/Counterclaimant*

PROOF OF SERVICE

I am employed in the County of Maricopa, State of Arizona. I am over the age of 18 and not a party to the within action; my business address is Tiffany & Bosco, P.A. 2525 E. Camelback Road, Suite 700, Phoenix, Arizona 85016.

On ___, 2020, I served the following described as:

DEFENDANT/COUNTERCLAIMANT MARTIN TRIPP'S PROPOSED SURREPLY TO TESLA, INC.'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT [ECF NO. 193]

on the following interested parties in this action:

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☒ (BY E-MAIL) By transmitting the above documents to the above e-mail addresses.

☒ (STATE) I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

EXECUTED on this ___ day of ___, 2020 at Phoenix, Arizona.

/s/William M. Fischbach III

EXHIBIT J



COURT REPORTING

LEGAL VIDEOGRAPHY

VIDEOCONFERENCING

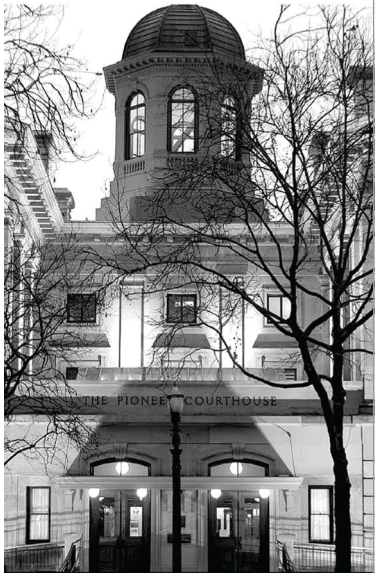
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**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

TESLA, INC.,

Plaintiff,

vs.

No. 3:18-CV-00296-LRH-CBC

MARTIN TRIPP,

Defendant.

CONFIDENTIAL

DEPOSITION OF

NICHOLAS RYAN GICINTO

**TAKEN ON
TUESDAY, AUGUST 27, 2019
9:58 A.M.**

**HOME2SUITES CONFERENCE CENTER
2001 MAIN STREET
KANSAS CITY, MISSOURI 64108**

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1 **EXAMINATION**

2 **BY MR. FISCHBACH:**

3 Q. Good morning, sir. Could we have your
4 full name for the record.

5 A. Nicholas Ryan Gicinto.

6 Q. And sir, have you been deposed before?

7 A. Yes.

8 Q. I'm going to tell you a couple things you
9 probably know but they're good to get on the record
10 early on.

11 A. Okay.

12 Q. You strike me as an intelligent and
13 educated guy, so you're probably going to anticipate
14 a lot of my questions and where they're going.
15 Please let me finish the question. It helps the
16 court reporter get a good, clean record.

17 A. Okay.

18 Q. Let's do our best not to talk over each
19 other, because again, it makes it much harder on the
20 court reporter if she has to transcribe two people
21 talking.

22 A. I understand.

23 Q. And then please know if you have an
24 affirmative response or a negative response please
25 give me a yes or a no or something along those

1 **near future?**

2 A. I think if someone had the -- somebody,
3 you know, who is working as a production associate
4 at that stage, who had bounced around to a few
5 different jobs, and, you know, who is selling off,
6 particularly selling off things because they needed
7 the money to move is the way they had sort of -- I
8 mean, it just -- it was a very strange sort of
9 confluence of indicators, right? You know, selling
10 things for a matter of \$50 or selling things that
11 were very important to them because they were
12 leaving, moving overseas, yet they had a retirement
13 plan. Just it was -- I would say at the most or
14 maybe at the very least it was something that just
15 didn't seem to fit together.

16 **Q. What was he trying to sell for \$50?**

17 **A. The firearm.**

18 **Q. Did you think that was a low price, high**
19 **price?**

20 **A. It seemed to be a low price like just**
21 **trying to offload it to somebody and make it an**
22 **attractive price.**

23 **Q. When you interviewed Mr. Tripp on June**
24 **14th and 15th, did you inquire about his access to**
25 **weapons?**

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A.

No.

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Q. Did you have any concerns -- well, did anything in that interview give you any concern that Mr. Tripp might do something violent?

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A. So we understood a few indicators of his background. We had the -- we had the information about, you know, selling the firearm or attempting to sell a fireman, attempting to sell some related material online, and, you know, we understood from -- from interviews and from his work history and file that he had been somewhat volatile, getting very upset particularly when he disagreed with colleagues, you know, he walked in with a backpack, we didn't ask to look at the backpack or see anything inside. We allowed him to sit close to the door which put our backs to the wall with only one exit. These are things you think about from a basic security standpoint. It wasn't anything specifically with him about how we placed the room but we try to make the interviewee feel as comfortable as possible. So I think you tend to have that always in the back of your mind about whether or not when it gets to the point in the interview where the interviewee feels as though, you know, they -- they may be in the wrong and it's

1 obvious and apparent they're in the wrong based on
2 where the questions are going, they may react, you
3 know, in a certain way. So it had come to our
4 attention in the past he had become quite upset. So
5 I think you just think about those factors.

6 **Q. Do you own a firearm?**

7 **MR. UMHOFFER:** Objection. I instruct the
8 witness not to answer. He's got a right to privacy.

9 **MR. FISCHBACH:** Do you have a position on
10 that, Sean?

11 **MR. GATES:** No, it's up to him.

12 **BY MR. FISCHBACH:**

13 **Q. Is it your testimony that the mere fact of**
14 **owning a firearm is an indicator that you might be a**
15 **violent person?**

16 **A. I've never said that and that's not what I**
17 **am saying.**

18 **Q. I just wanted to make sure because --**

19 **A.** What I'm discussing is the access to,
20 right, so we had, at least had an indication of
21 access to. If we had no -- nothing to -- nothing to
22 suggest that there was access to, it doesn't mean
23 that he didn't, but it's at least on our mind,
24 right? We know it because it had come up in the
25 interviews so you can't just block that out.

1 charges 395 now.

2 **Q. And I'm sure you're worth it, sir.**

3 **MR. FISCHBACH:** Thank you very much for
4 your time today. I don't have any further.

5 **MR. GATES:** No further questions.

6 **THE VIDEOGRAPHER:** Please stand by. We do
7 need to take transcript and video orders on record.

8 **MR. FISCHBACH:** Oh, I've got to go first?
9 We'll do electronic with exhibits, please. Full size
10 and mini.

11 **MR. GATES:** I need electronic transcripts
12 in text format and the video with sync.

13 **MR. FISCHBACH:** Yeah, me too.

14 **MR. UMHOFFER:** We want an opportunity for
15 him to review the transcript for accuracy.

16 **THE VIDEOGRAPHER:** The time is 3:21 p.m.
17 and we are going off the record.

18 **(Deposition concluded at 3:21 p.m.)**
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CERTIFICATE

I, Terri L. Huseth, do hereby certify that I reported all proceedings adduced in the foregoing matter and that the foregoing transcript pages constitutes a full, true and accurate record of said proceedings to the best of my ability.

I further certify that I am neither related to counsel or any party to the proceedings nor have any interest in the outcome of the proceedings.

IN WITNESS HEREOF, I have hereunto set my hand this 4th day of September, 2019.



Terri L. Huseth

EXHIBIT K

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

TESLA, INC., a Delaware corporation,

Plaintiff,

vs.

MARTIN TRIPP, an individual,

Defendant.

Case No. 3:18-cv-00296-LRH-CBC

**PLAINTIFF AND COUNTER-DEFENDANT
 TESLA, INC.'S AMENDED RESPONSES
 AND OBJECTIONS TO DEFENDANT AND
 COUNTER-CLAIMANT MARTIN TRIPP'S
 SECOND SET OF INTERROGATORIES**

AND RELATED COUNTERCLAIMS

PROPOUNDING PARTY:

Defendant/Counter-Claimant Martin Tripp

RESPONDING PARTY:

Plaintiff/Counter-Defendant Tesla, Inc.

SET NO.:

Two (Nos. 9-25)

EXHIBIT 12

Musk

2/21/2020

Reported by: Michael P. Hensley
 CSR 14114, RDR

TESLA, INC.'S AMENDED RESPONSES AND OBJECTIONS TO INTERROGATORIES, SET TWO

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19 **INTERROGATORY NO. 12:**

20 Identify and explain All information regarding the Alleged Threat known by Elon Musk
21 prior to his sending the e-mail communication referenced in Paragraph 54 of the Counterclaim,
22 including:

- 23 • When Mr. Musk first became aware of the Alleged Threat
- 24 • All persons with whom Mr. Musk discussed the Alleged Threat on June 20, 2018
- 25 • Who provided Mr. Musk with the information of which he was aware
- 26 • What actions Mr. Musk took to verify the information

27

28

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AMENDED RESPONSE TO INTERROGATORY NO. 12:

In addition to its general objections, which are incorporated herein by reference, Tesla objects to this Interrogatory as overbroad, unduly burdensome, and not proportional to the needs of the case in that it asks Tesla to “[i]dentify and explain All information regarding the Alleged Threat known by Elon Musk” regarding the threat to the Gigafactory on June 20, 2018. Tesla objects to this Request as argumentative, particularly as to the use of the term “Alleged Threat.” Tesla further objects to this Interrogatory to the extent that it calls for information protected by the attorney-client privilege, work product doctrine, and all other applicable privileges, protections, or immunities. Such information will not be provided in response.

Subject to and without waiving the foregoing general and specific objections, Tesla responds to this Interrogatory as follows:

On June 20, 2018, Shamara Bell, an operator at Tesla’s Las Vegas call center, received a phone call from someone who stated that he was a very close friend of Tripp. The caller told Ms. Bell that he feared for the safety of employees at the Gigafactory because Tripp was extremely volatile, very well heavily armed, extremely upset, and very hostile. The caller sounded genuinely concerned and afraid that Tripp would do something violent and volatile. Ms. Bell asked the caller to provide his name and contact information. The caller declined, stating that he wanted to remain anonymous. *See* TES-TRIPP_0000970; TES-TRIPP_0003390. Ms. Bell reported the call to her supervisors (including Angel Besinaiz and Kristin Krerowicz) who notified members of Tesla’s security team (including Jeff Jones, Avery Bustamante, and Marshall Sprott). *See, e.g.*, TES-TRIPP_0003386-88. Tesla security immediately alerted the Storey County Sheriff’s Office and mobilized additional security personnel to the Gigafactory.

Tesla security also reached out to personnel at the Las Vegas call center to obtain more information about the call. Mr. Bustamante spoke with Ms. Bell, who confirmed that the caller identified Tripp as the source of the threat and the Gigafactory as the target. Mr. Bustamante spoke to Ms. Bell a second time, asking Ms. Bell to send an email to Mr. Jones recapping the call that she received. *See* TES-TRIPP-0016596-97. Tesla security also informed Sarah O’Brien, Tesla’s former Vice President of Communications, that security received an alert from the Las Vegas call

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center about a threat to the Gigafactory. Thereafter, Ms. O'Brien spoke to Mr. Besinaiz, who confirmed that the call center received the call described above. On June 21, 2018, Ms. O'Brien spoke to Ms. Bell and **Ashley Ferrigno, Ms. Bell's and Mr. Besinaiz's supervisor**. Ms. Bell confirmed that she answered a call on June 20, 2018 from an anonymous caller who identified himself as a friend of Tripp. Ms. Bell further confirmed that the caller stated that he feared for the safety of employees at the Gigafactory because Tripp was extremely upset, extremely volatile, and heavily armed.

Mr. Musk was initially informed of the threat to the Gigafactory on June 20, 2018, likely by Sam Teller, Director, Office of the CEO. Mr. Musk was informed that Tesla received a call that Tripp was going to come in and shoot people at the Gigafactory. Mr. Musk was further informed that Tesla security alerted the police and posted additional security personnel at the Gigafactory. Mr. Musk also discussed the Gigafactory threat with Mr. Jones, Ms. O'Brien, and Dave Arnold, Tesla's Senior Director of Global Communications. Mr. Musk relied on Tesla's security and communications teams to obtain information concerning the threat to the Gigafactory.

INTERROGATORY NO. 13:

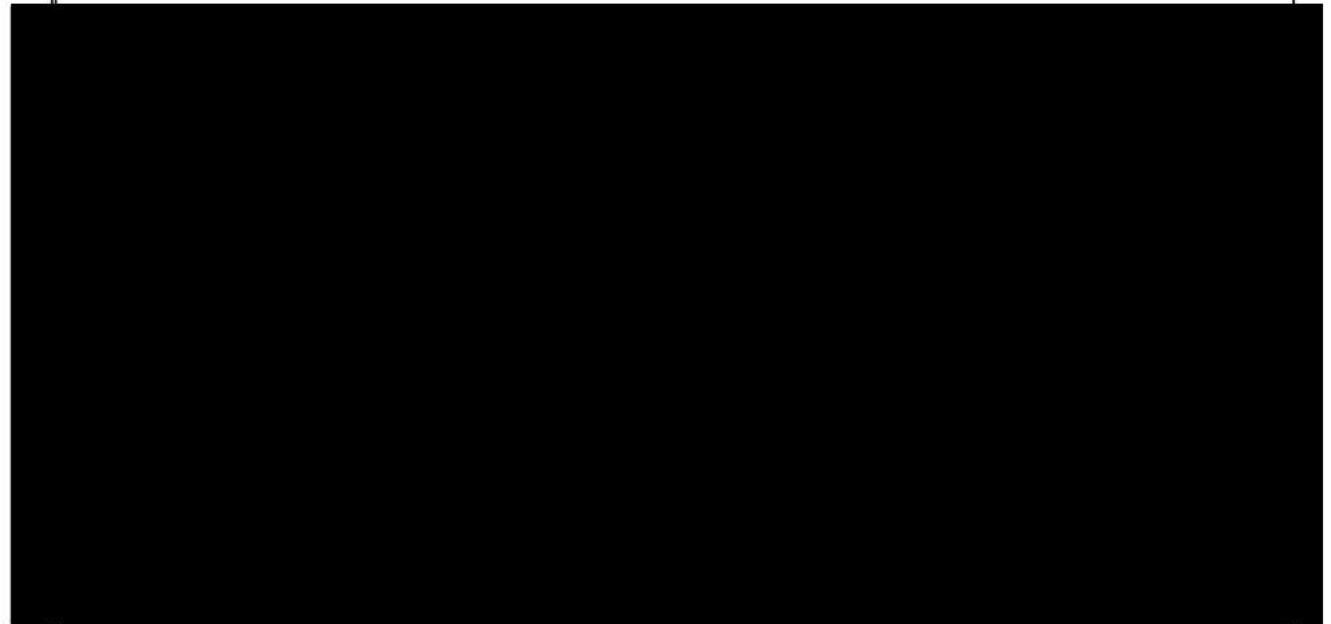
Identify and explain All information known by Elon Musk regarding the contents of the e-mail communication referenced in Paragraph 47 of the Counterclaim before sending said e-mail communication, including:

- When Mr. Musk first became aware of the "sabotage" alleged therein
- Who provided Mr. Musk with the information of which he was aware
- What actions Mr. Musk took to verify the information

RESPONSE TO INTERROGATORY NO. 13:

In addition to its general objections, which are incorporated herein by reference, Tesla objects to this Interrogatory as overbroad, unduly burdensome, and not proportional to the needs of the case in that it asks Tesla to "[i]dentify and explain All information." Tesla objects to this Request as overly broad, vague, and ambiguous to the extent that it fails to specify the portions of the email to which it refers. Tesla further objects to this Interrogatory to the extent that it seeks information protected by the attorney-client privilege, work product doctrine, and all other


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Dated: May 20, 2019

HUESTON HENNIGAN LLP

By: 
Allison L. Libeu
Attorneys for Plaintiff and
Counter-Defendant Tesla, Inc.

PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 620 Newport Center Drive, Suite 1300, Newport Beach, CA 92660.

On May 20, 2019, I served the foregoing document(s) described as:

**PLAINTIFF AND COUNTER-DEFENDANT TESLA INC.'S RESPONSES AND
OBJECTIONS TO DEFENDANT AND COUNTER-CLAIMANT MARTIN TRIPP'S
SECOND SET OF INTERROGATORIES**

☒ (BY E-MAIL) By transmitting a true copy of the foregoing document(s) by **Email or Electronic Transmission:**

Based on an agreement of the parties to accept service by email or electronic transmission. I caused the document(s) to be sent from email address sjones@hueston.com to the persons at the email addresses listed on the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful:

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William M. Fischbach III
Christopher J. Waznik
Matthew D. Dayton
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E-MAIL: md@tblaw.com

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on May 20, 2019, at Newport Beach, California.

Stephen Richards
(Type or print name)

/s/ Stephen Richards
(Signature)